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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2011-CP-06-476

Don Alexander, Carolyne Williams, Georgia Fields,
William R. "Bob" Dixon, Colonel Joe H. Zorn, Jr.,
Melanie Wright, and Dr. M. O. Khan.....Appellants

v.

Freddie Houston, David Kenner, Keith Sloan, Lowell Jowers, Sr.,
Joe Smith, Harold Buckmon, and Travis Black, individually and
In their capacity as members of Barnwell County
Council.....Respondents

BRIEF OF RESPONDENTS

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October 22, 2012

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STATEMENT OF THE CASE

Appellants filed their Summons and Complaint, for declaratory relief and for damages on December 20, 2011, and thereafter served the nine respondents, members of Barnwell County Council. An Amended Complaint, reflecting withdrawal of one of the Plaintiffs, was filed on January 4, 2012, and on January 31, 2012, Appellants' sought to file a Second Amended Complaint, reducing the number of plaintiffs to six.

Respondents filed their Motion to Dismiss pursuant to Rule 12 (b)(6) on January 19, 2012. Subsequently, on February 7, 2012, Appellants filed a Motion to Dismiss or to Strike Respondents' Motion to Dismiss, asserting the insufficiency of Respondents' statement of grounds or reason for their motion. Subsequently, Appellants withdrew this motion.

Both parties were afforded the opportunity of ten additional days to supplement their memoranda on the Motion to Dismiss, following the hearing before the Honorable Ed Dickson on February 9, 2012. By written Order of April 30, 2012, filed May 2, 2012, the Circuit Court dismissed Appellants' Complaint, concluding that only two of the Appellants had standing to bring their action; that those two Appellants' lawsuit presented a non-justiciable political question; and that County Council Members/Respondents' appointing themselves to service on the Hospital Board did not amount to Constitutionally impermissible dual office holding.

STATEMENT OF THE FACTS

“In 1953, the South Carolina General Assembly initially created the Barnwell County Hospital Board, to acquire land and to construct a hospital, to be owned and operated by Barnwell County Hospital’s Board of Trustees”. Complaint, para. 19. (R.p. 14).

Appellants alleged in Paragraph 20, that Barnwell County Hospital Board of Directors “is a *sub-entity of Barnwell County*”(emphasis added). And in Paragraph 22 (R.p. 15) that, pursuant to the County’s 2003 Ordinance, 2003 -178, the “members of the Hospital Board must be appointed by Barnwell County Council”. See, Ordinances of Barnwell County Council, 1986-26, 1988-35, 1993- 62, 1995-88, and 2003 -178, Defendants’ Memorandum in Support, Exhibits 2, 3, 4, 5 and 6. (R. pp. 46, 48, 51, 53, 55).

The County Ordinances reveal that the Respondents, members of County Council, operated both the hospital and the County Nursing Home, without a Board, for two years between the enactment of Ordinance No. 1986-26, and the enactment of 1988-35. When the Board of Trustees was created some two years later, it merely had custody of Barnwell County’s property relating to the Hospital, while ownership remained with the County.

Appellants alleged that Respondents, in conjunction with the county councils of Allendale and Bamberg began taking steps in 2009 toward closing the county hospitals, and took steps to reduce county funding for the hospital (Complaint, para. 25) (R.p. 15); lowered millage rates and reduced funding for the Hospital (Complaint, para. 26) (R.p. 16); improperly paid excessive amounts to Williston Rescue Squad (Complaint, para. 27

- 29) (R.p. 16); frustrated the Hospital Board's efforts to secure a \$ 1.4 million USDA loan (Complaint, para. 30) (R.p. 17); and vetoed a nearly approved application for designation as critical access facility (complaint, para. 31) (R.p. 17); and pursued negotiations for the new three county hospital facility (Complaint, para.32 - 41) (R. pp. 17 - 19); and on April 26, 2011 voted to replace the Hospital Board (Complaint, para. 42) (R. p. 19).

In Paragraph 59 of the Complaint, (R.p. 22), Appellants alleged that the Respondents, while acting as the newly self-appointed Hospital Board, "were without power and control to authorize a sale of the Hospital's assets to Dobbs Equity and without power and control to authorize the Hospital's bankruptcy petition". In the next succeeding paragraph, (R.p. 22) Appellants also assert that the Respondents, "by appointing themselves as the new Hospital Board, have effectively vacated, resigned and/or forfeited their positions as member of Barnwell County Council".

ARGUMENT

I. THE TRIAL COURT CORRECTLY DISMISSED THE COMPLAINT BECAUSE THE MATTERS ALLEGED BY APPELLANTS AMOUNTED TO NON-JUSTICIABLE POLITICAL QUESTIONS.

In granting Respondents' Motion to Dismiss, the lower court concluded that the Appellants "have not satisfied the justiciable controversy requirement because their challenge to the actions of the Barnwell County Council is a non-justiciable matter affected by the separation of powers created by the South Carolina and United States constitutions". Order, p. 5. (R.p. 5).

Appellants contend on appeal that the lower court erred in dismissing on that ground because "nothing in that [Home Rule] Act can be construed to allow a local government to violate the Constitution and escape judicial review", asserting that the lower court misconstrued the political question holding of Baker v. Carr, 369 U.S.186, 82 S. Ct. 691, 7 L. Ed. 2d 663(1962), noting that "[a]ny actions taken by Respondents pursuant to the Home Rule Act must still pass Constitutional muster". Brief of Appellants, p. 8.

In support of their Motion to Dismiss, Respondents raised lack of standing, political question/separation of powers and failure to sufficiently allege a cause of action as to dual office holding and as to breach of fiduciary duty. In ruling on Respondents' Motion, the court agreed that all but 2 of the Appellants lacked standing. As to those two Appellants, the court determined both that the justiciability requirement had not been satisfied because the Appellants' case presented a political question, and that the facts alleged in the Complaint failed to describe prohibited dual office holding.

“The nonjusticiability of a political question is primarily a function of the separation of powers.” Seegars Andrews v Judicial Merit Selection Committee, 387 S.C. 109, 691 S.E. 2d 453 (2010); citing S.C. Pub. Interest Found. v. Judicial Merit Selection Comm'n, 369 S.C. 139, 142, 632 S.E.2d 277, 278 (2006). The Court of Appeals has recognized the appropriateness of the political question doctrine, even when faced with a claim that another branch of government has deprived the claimant of a constitutional right:

Judicial inquiry into legislative motivation is to be avoided”. South Carolina Educ. Ass'n v. Campbell, 883 F.2d 1251 (4th Cir.1989). “Such inquiries endanger the separation of powers doctrine, representing a substantial judicial ‘intrusion into the workings of other branches of government.’ Id. at 1257 (quoting Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 268 n. 18, 97 S.Ct. 555, 50 L.Ed.2d 450, (1977)).

Pressley v. Lancaster County, 343 S.C. 696, 542 S.E.2d 366 (Ct. App. 2001).

In Wilson v. Preston, 378 S.C. 348, 662 S.E.2d 580 (2008), in which the Supreme Court was asked by the Anderson County Administrator to give to a councilmember full access to all financial records pertaining to operation of county government, Chief Justice Toal agreed with the majority’s decision to deny the relief sought and in a concurring opinion, articulated her view of the political question and separation of powers:

In my view, issues related to the propriety of Respondent's actions in this case present purely political questions, the resolution of which rests solely within the Council's domain. In my opinion, any ruling from this Court would impermissibly operate as judicial review of the Council's policy decisions, and I would decline Appellant's request to intrude in this area.

Wilson, at 586.

One of the defining cases on the political question doctrine is the 1962 U.S. Supreme Court case of Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L. Ed. 2d 663 (1962).

In that historic redistricting case, the Court explained the justiciability requirement in relation to political questions :

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. *Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.*

Baker v. Carr, 369 U.S. at 217. (Emphasis added).

Appellants cannot deny the applicability of the first of these six factors: The South Carolina Home Rule Act is rooted in the state constitution's commitment of county governance to the counties, set forth in Article VIII, Section 7:

The General Assembly shall provide by general law for the structure, organization, powers, duties, functions, and the responsibilities of counties, including the power to tax different areas at different rates of taxation related to the nature and level of governmental services provided. Alternate forms of government, not to exceed five, shall be established. No laws for a specific county shall be enacted and no county shall be exempted from the general laws or laws applicable to the selected alternative form of government.

Pursuant to the foregoing constitutional provision, the General Assembly enacted the Home Rule Act, specifying the powers conferred on the counties in Sections 4-9-30(5) and (6):

(5)(a) to assess property and levy ad valorem property taxes and uniform service charges, including the power to tax different areas at different rates related to the nature and level of governmental services provided and make appropriations for functions and operations of the county, including, but not limited to, appropriations for general public works, including roads, drainage, street lighting, and other public works; water treatment and distribution; sewage collection and treatment; courts and criminal justice administration; correctional institutions;

public health; social services; transportation; planning; economic development; recreation; public safety, including police and fire protection, disaster preparedness, regulatory code enforcement; *hospital and medical care*; sanitation, including solid waste collection and disposal; elections; libraries; and to provide for the regulation and enforcement of the above.

(6) to establish such agencies, departments, boards, commissions and positions in the county as may be necessary and proper to provide services of local concern for public purposes, to prescribe the functions thereof and to regulate, modify, merge or abolish any such agencies, departments, boards, commissions and positions, except as otherwise provided for in this title.

S.C. Code Ann. § 4-9-30 (1976). Emphasis added.

In addition to the demonstrable constitutional commitment of issue to another branch of government, the second Baker v. Carr factor, “lack of judicially discoverable and manageable standards for resolving” also has application to the circumstances of this matter, for, although dual office holding is prohibited in the constitution, (Article VI, Section 3), the means of addressing non-compliance are neither expressed nor readily determinable by the state judiciary, where the administration and governance is committed to the local government.

In their attempt to evade the Baker v. Carr definition of a political question, Appellants argue it is not dispositive in this case, because “Appellants are not challenging Respondents’ right to administer Barnwell County or create boards. They are seeking a determination as to whether a specific exercise of that right has violated the Constitution”. Appellants’ Brief, p. 9.

It is undisputed that the judicial branch retains subject matter jurisdiction to consider whether or not the acts or actions of a local governmental authority have run afoul of constitutional limitations or protections in an individual case. However, Baker v. Carr furnishes the structural framework for all such considerations in the first instance:

Much confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, *or whether the action of that branch exceeds whatever authority has been committed*, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

Baker v. Carr, 369 U.S. at 211. Emphasis added.

The acts and actions by County Council, of which Appellants have complained were clearly within the powers committed to local governments by Article VIII Section 7 of the South Carolina Constitution, and more specifically reflected in the Home Rule Act, sections 4-9-30 (5) and (6).

The Court in Baker v. Carr revealed that recognition of a political question is not a simple, *prima facie* impression, but necessarily involves some degree of inquiry into the particular nature of the case:

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence. The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority. *The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.*

Baker v. Carr, at 217.(Emphasis added).

Under this charge, a court considering a Motion to Dismiss for failure to allege facts constituting a cause of action must look not only to the six Baker v. Carr factors, but also at the "precise facts and posture of the particular case" in order to determine if the case presents a political question. Such an inquiry in the case at bar reveals not only that the first two factors are inextricably involved, but also that the precise facts alleged do not amount to prohibited dual office holding. Fulfillment of the requirement to examine

the facts and posture on this Motion to Dismiss entails careful scrutiny of the allegations of Appellants' complaint. Examination of those allegations reveals clearly that the lower court correctly concluded that Appellants failed to allege facts to constitute the constitutionally prohibited dual office holding, so that this matter ought to be dismissed as a political question.

II. THE TRIAL COURT CORRECTLY DISMISSED THE COMPLAINT BECAUSE THE FACTS ALLEGED TO NOT SUPPORT APPELLANTS' CONTENTION OF UNCONSTITUTIONAL DUAL OFFICE HOLDING BY RESPONDENTS.

Appellants argue that the lower court erred in finding that Appellants' claims were purely political questions and that "a declaratory judgment would not be proper", and then addressing the "question of whether Respondents had violated the prohibition against dual office holding, and concluded that 'the evil sought to be avoided by the constitutional prohibition against dual office holding [does not exist in this case']".

As an initial matter, Appellants assert in Footnote 5 that whether or not Respondents have violated the prohibition on dual office holding is a novel factual issue that is inappropriate for resolution on a Motion to Dismiss, citing the general rule of Evans v. State, 344 S.C. 60, 543 S.E. 2d 547 (2001). That general rule is not controlling in the case at bar, where there is no real dispute as to the operative facts alleged in the complaint. "[W]here the dispute is not as to the underlying facts but as to interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss for failure to state a claim." Brown v. Theos. 338 S.C. 305, 526 S.E.2d 232 (Ct.App.1999).

On the matter of dual office holding, Appellants argue that the lower court erred in determining that Respondents' appointment of themselves to positions on the Hospital Board did not amount to dual office holding, citing support in the supreme court case of Richardson v. Town of Mt. Pleasant, 350 S.C. 291, 566 S.E. 2d 523 (2002), which Appellants describe as controlling.

While Richardson may be controlling authority in the appropriate case, it is not controlling in the case at bar, and is largely irrelevant to the analysis necessitated by the facts as alleged by the Appellants.

The lower court correctly recognized that this is not a case of dual office holding, not because of any incompatibility as contended by Appellants, but because the duties of a member of the Hospital Board are wholly included and embraced within the duties of the office of county council member. Members of the Hospital Board have no power nor authority outside of or beyond those powers reposed originally in Barnwell County Council. The Hospital Board is analogous to an agent; the agent has neither authority nor power to act in any manner beyond the power and authority of the principal, in this case, County Council.

In this respect, while the office of Hospital Board member has a unique and distinct identity, the member acquires through his or her appointment, no authority nor powers not initially possessed by members of county council. So, while there are two offices, Council member and Board member, the Board Members' power is wholly derived from and carved out of powers of members of County Council. The duality in this circumstance is merely vertical, and not horizontal. That is, there is no greater aggregation of power or authority for a council member also serving as Hospital Board member. Appellants acknowledged the vertical duality of the offices of County Council member and Hospital Board Member in this case when they alleged that the Hospital Board is a "sub-entity of Barnwell County". Complaint, par. 20. (R.p. 14).

Appellants' argument that Richardson removed incompatibility as an element of a dual office holding violation, misses the point. Respondents have not contended and do

not argue that the offices of County Council and Hospital Board must be incompatible for there to be a violation of the dual office prohibition. Respondents assert instead that, where the “second” office is wholly included within or under the first office, for example where the “second” office is a “sub-entity” of the first, even though there are two cognizable offices, there is no expansion, aggregation nor concentration of powers arising from the appointment to the second office. There is patently no reason to prohibit dual office holding of this manner.

The outcome would be significantly different, and there would probably be a dual office holding violation if, for example, a member of a City Council were appointed to serve on a County Hospital Board. In that circumstance, the putative Board Member would possess not only his powers as a City Council member, but his powers would expand as he acquired new, additional County power and authority by becoming a Hospital Board member. In the case at bar, there is absolutely no expansion of powers accruing to Council Members also serving on the Hospital Board. This is in stark contrast to the situation of the City Council member described above who clearly acquires additional county powers, conferred upon him with the new office. That scenario would clearly violate the prohibition of dual office holding, as was reflected in the Opinion of the Attorney General cited by Appellants. *Op. S.C. Attorney General*, February 26, 2007. But, those facts are not present in this case.

Careful reading of the constitutional limitation of dual office holding, along with the scarce caselaw and South Carolina Attorney General’s opinions reveals convincingly that the defendants’ service as members of both County Council and Hospital Board, does not present a concern for concentration or increasing of powers in one individual.

In this case, County Council's assumption of membership on the Hospital Board results in no greater power or control than it has always had as County Council. All along, the Hospital Board has had only those powers originally given to them by Ordinances of County Council. With the so-called "dual office" in this matter being nothing more than a principal retaking power/authority from its agent, there can be none of the harm sought to be avoided by the prohibition against dual office holding.

Contrasting the two offices at issue in this matter, with those cases in which the duality of office was prohibited or opined as unacceptable, it is apparent that in all the other cases, the offices were horizontally dual, while Barnwell County Council and Hospital Board are vertically dual. Clearly, there are no powers possessed by the members of County Council which have been expanded or increased by those individuals assuming the Board positions, and there can be no conflict of interest between the County Council and the Board.

Recognition of this reality means that the members of county council did not, by assuming the position of Hospital Board, impermissibly hold dual offices.

CONCLUSION

At the core of this matter is the question of whether or not Respondents, members of Barnwell County Council, violated the South Carolina Constitution's prohibition against dual office holding. In order to address this matter, it is first necessary to inquire whether or not this case presents a justiciable issue, or if the matters presented amount to a non-justiciable political question.

The analysis of justiciability involves and requires examination of not only the six factors of Baker v. Carr, but also whether the precise facts and posture of the case compel recognition that the matter raises a political question. Such inquiry into the allegations of the Complaint reveals that Appellants have failed to allege facts which, if proven, would demonstrate that Respondents' appointment of themselves to the Hospital Board violated the constitutional prohibition on dual office holding. Clearly, although the offices of Council Member and Hospital Board member are distinct, the power and authority of the Hospital Board are lesser included, and wholly derivative of the powers of County Council, and this vertical duality does not violate the constitutional prohibition.

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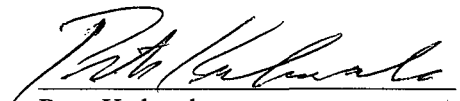
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b)
SCACR.



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PROOF OF SERVICE

I certify that I have served the Brief of Respondents on Appellant's Counsel, A. Camden Lewis and Ariail E. King, by depositing a copy of each in the United States Mail, Postage prepaid, on October 23, 2012, addressed as follows:

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